RECENT AMERICAN DECISIONS.

In the Supreme Court of the State of Wisconsin. May 15, 1862.

TODD *vs.* LYDIA A. AND FRANCIS C. LEE.

WRIGHT *et als. vs.* THE SAME.

JUFFRAYS *vs.* THE SAME.

TAYLOR *et al. vs.* THE SAME.

FARIES *vs.* THE SAME.

1. The contracts of a *feme covert*, when necessary or convenient to the proper use and enjoyment of her separate estate by virtue of the enabling statutes (secs. 1, 2, and 3, R. S. Wis. 1858[1]), are binding upon the estate at law. (*Conway* vs. *Smith*, 13 Wis.)
2. All her other engagements stand as before, good only in equity. (The case of *Yale* vs. *Dederer*, 22 N. Y. 450, considered and disapproved; s. c., 18 N. Y. 265, approved.)
3. The change from an equitable to a legal estate, has not, with respect to her general engagements, enlarged her powers or removed the disability of coverture, but she remains as if still possessed of an estate in equity without restriction as to the *jus disponendi*, capable of charging it with debts incurred for her own benefit or the benefit of her estate, to its full extent, and such charge may be enforced in a civil action under the Code of Procedure.
4. The action should be *in rem* not *in personam*, for she is incapable of charging herself *personally* either in equity or at law.

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[1] CHAPTER XCV.

OF THE RIGHTS OF MARRIED WOMEN.

SECTION 1. The real estate, and the rents, issues, and profits thereof, of any female now married, shall not be subject to the disposal of her husband, but shall be her sole and separate property, as if she were a single female.

SECTION 2. The real and personal property of any female who may hereafter marry, and which she shall own at the time of marriage, and the rents, issues, and profits thereof, shall not be subject to the disposal of her husband, nor be liable for his debts, and shall continue her sole and separate property.

SECTION 3. Any married female may receive by inheritance, or by gift, grant, devise, or bequest, from any person other than her husband, and hold to her sole and separate use, and convey and devise real and personal property, and any interest or estate therein, and the rents, issues, and profits, in the same manner and with like effect as if she were unmarried, and the same shall not be subject to the disposal of her husband, nor be liable for his debts.

5. Injunctions and receivers in such actions may be had to preserve the property during the pendency of the suits, and to convert the property and satisfy the debts, for want of other process, after judgment.
6. The husband is a proper party, but no personal demand can be made against him in such cases. At common law the personalty of the wife rests absolutely in the husband, and although he may be liable for her debts upon the principles of agency, yet, even under the Code of Procedure, to bind him or his property, a separate action at law must be brought. This common law rule has no application in such cases in equity; and whether he is liable or not is a question of fact for the jury.[1]
7. L., a *feme covert*, the owner of a separate estate under the enabling statute, with her husband's permission, upon the faith and credit of her separate estate, purchased goods and hired a store, and engaged in trade as if she were *sole*. She failed to pay for the rent, and refused to pay for the goods, because of coverture. In actions brought to charge the rent and price of the goods upon her separate estate, and to apply the goods left to liquidate the claims in suit, *Held*, That as it is an established rule in equity that a *feme covert* may, with her husband's permission, given even after marriage, become a *sole trader*, and hold the profits arising out of her business to her sole and separate use, so equity, in consideration of the benefit thus accruing to her separate property, will charge the debts properly incurred in trade upon it, and apply both her separate property and stock in trade to their payment, through a receiver.

These were actions under the Code of Procedure, brought to charge the married woman defendant's separate property, held under the enabling statute of 1850 (R. S. Wis. c. 95, secs. 1, 2, and 3), with the payment of debts incurred by her in separate trade, and to reach the capital invested in the business. They were commenced before the County Court for Milwaukee county; the first three entitled suits were removed to the Circuit Court for that county, where the orders granting injunctions and a receiver, which had been obtained in the County Court, to restrain the dissipation of the property and preserve it during the litigation, were vacated. From the orders dissolving the injunctions and vacating the order appointing the receiver, the plaintiffs appealed. The last two entitled suits were sent to the Circuit Court for Dane county, where, upon the hearing, they were dismissed, and judgments for costs given against the plaintiffs, from which they appealed.

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1 *Oxnard* vs. *Seaton*, 39 Maine 119; Id. 125; *Burger* vs. *White*, 2 Bosw. Sup. Ct. 92.

The questions involved were nearly identical in all the cases, and are disposed of together.

By the Court. DIXON, C. J.—Before the case of *Yale* vs. *Dederer*, 22 N. Y. 450, it was well settled in New York, if, in fact, anything can ever be said to be settled in that state, *that a married woman having a separate estate might bind it by her general engagements to pay debts contracted for the benefit of such estate, or on her own account, or for her benefit upon the credit of it. Metho. Epis. Church* vs. *Jaques*, 3 Johns. Ch. 77; S. C., in Court of Errors, 17 Johns. 548; *North American Coal Co.* vs. *Dyett*, 7 Paige 9; S. C., in Court of Errors, 20 Wend. 570; *Gardner* vs. *Gardner*, 7 Paige 112; S. C., in Court of Errors, 22 Wend. 526; *Curtis* vs. *Engel*, 2 Sanf. Ch. 287; *Yale* vs. *Dederer*, 18 N. Y. 265.

In England a broader doctrine prevails. It has been decided that she may not only bind her separate property by a general engagement, written or parol, for her own benefit, or that of her estate (*Murray* vs. *Barlee*, 3 M. & K. 209; *Owens* vs. *Dickenson*, 1 Cr. & Ph. 48), but that she can do so by the execution of a bond as surety for her husband (2 Atk. 69; 1 Bro. C. C. 16): and for a stranger even (15 Vesey 596).

In Kentucky her separate estate has been charged with the payment of a note executed as surety for her son, and parol evidence of her declaration, made at the time of executing it, that she would not pay it, and her separate property should not go for that purpose, was excluded (7 B. Mon. 293).

The courts of New York, however, have held to a narrower rule, and she has been restricted within the limits above stated.

The rule given by SPENCER, C. J., 17 Johns., and COWEN, J., in 20 Wend., is indeed somewhat less stringent, and accords more nearly with the English decisions. SPENCER, C. J., says: "I am entirely satisfied that the established rule in equity is, that when a *feme covert*, having separate property, enters into an agreement, and sufficiently indicates her intention to affect by it her separate estate, when there is no fraud or unfair advantage taken of her, a

Court of Equity will apply it to the satisfaction of such engagement. Judge COWEN states it thus: "When her separate estate is completely distinct, and, as here, independent of her husband, she seems to be regarded in equity as respects her power to dispose of or charge it with debts, to all intents and purposes as a *feme sole*, except in so far as she may be expressly limited in her powers by the instrument under which she takes her interest."

"The *feme covert*," says Chancellor WALWORTH, in *North American Coal Co.* vs. *Dyett*, 7 Paige 9, "is as to her separate estate considered a *feme sole*, and may, in person or by her legally authorized agent, bind such separate estate with the payment of debts contracted for the benefit of that estate, or for her own benefit upon the credit of the separate estate." And again, in *Gardner* vs. *Gardner:* "So far as that estate is concerned, she is considered a *feme sole;* and the estate is answerable for money borrowed by her or her trustee for the benefit of such estate, although the husband is the lender."

In the same case, in 22 Wend., Judge COWEN uses these words: "If the wife holds an estate separate from and independent of her husband, as she may do in equity, chancery considers her in respect to her power over this estate a *feme sole;* and although she is still incapable of charging herself at law, and equally incapable in equity of charging herself personally with debts, yet I think the better opinion is, that separate debts, contracted by her expressly on her own account, shall in all cases be considered an appointment or appropriation for the benefit of the creditors as to so much of her separate estate as is sufficient to pay the debt, if she be not disabled to charge it by the terms of the donation." The Vice-Chancellor reports the rule in 2 Sandf. Ch., by saying that the complainants, "in order to sustain their suit, must show that the debt was contracted either *for the benefit of her separate estate, or for her own benefit upon the credit of the separate estate.*"

The rule as last laid down, is fully and explicitly sanctioned by the two judges delivering opinions in *Yale* vs. *Dederer*, 18 N. Y. The case there turned on the ground that the liability of a surety is *stricti juris*, and equity will not grant relief where there is no

obligation at law. *Mrs. Dederer* signed the note as surety for her husband. At law the note was void. She had executed no instrument creating a specific lien on her separate estate which would have been legally binding in case she had been a *feme sole*. In equity it was a mere general engagement, which could only be enforced upon principles of exact justice, and because it was against conscience for her to refuse payment. This element was entirely wanting. It was clearly not the case of a debt contracted on her own account, for her own benefit, or for the benefit of her estate. This is Judge COMSTOCK'S position. Judge HARRIS'S is substantially the same, though he treats it more as a question of evidence. He holds that the fact of her engaging generally in conjunction with her husband to pay money, is not sufficient evidence of an intention to charge her separate estate, that the presumption is the debt is that of the husband, and unless the contrary be shown the claim must be denied.

The contracts of a married woman, when necessary or convenient to the proper use and enjoyment of her separate estate, are binding at law. *Conway* vs. *Smith*, 13 Wis.

All her other engagements stand as before the passage of the statutes, good only in equity. The change from an equitable to a legal estate has not, with respect to them, enlarged her powers or removed the disability of coverture, but she remains as if still possessed of an estate in equity, without restriction as to the power of disposition. Idem *Wooster* vs. *Northrups*, 5 Wis. 245; *Yale* vs. *Dederer*, 18 N. Y. 265.

The debts in question belong to the latter class. Within all the authorities, the separate estate of a married woman will be charged in equity with the payment of debts contracted for her benefit. In this case we need not inquire further, for that the debts in question were beneficial to Mrs. Lee will readily appear. With the acknowledged consent and approbation of her husband, she engaged in business as a sole trader, the profits to be appropriated to her separate and exclusive use. She contracted these debts in the prosecution of that business. It is an established rule in such cases, that the earnings of a trade thus carried on will in equity

be deemed her separate property, and that she will be protected in its use as against her husband, though not his creditors. 2 Story's Eq. Juris., § 1387; 2 Roper on Husband and Wife (30 Law Lib.), 171–2; *Slanning* vs. *Style*, 3 P. Wms. 334; *Megrath* vs. *Robertson*, 1 Dess. 445; *Freeman* vs. *Orser*, 5 Duer 476; *Burger* vs. *White*, 2 Bosw. 92, 96, 99; 2 Ind. Eq. 553. See also *Gore* vs. *Knight*, 2 Vernon 535; *Gage* vs. *Lester*, 2 Bro. Cases Parl. 4. This is a sufficient consideration of benefit to charge her property with the payment of debts incurred in the business. If the agreement for a separate trade be by articles before marriage, without trustees, or if after, and founded upon a valuable consideration, the income and profits will be supported for her separate use against her husband and his creditors. But if after marriage he merely permit her to conduct business on her separate account, the earnings will be protected only as against him. Story's Eq., *supra*. In such cases a Court of Equity will make him a trustee for her separate use, and compel him to account to her or her creditors for the profits which may come to his hands. Roper on Husband and Wife, *supra*. But while the beneficial interests of the wife is thus recognised and enforced in equity, her condition at law is very different. There the profits as well as the capital employed are the husband's, there being no trustees, no obstacle to interfere between the rule of law which vests in him all the wife's personal property accruing to her during the marriage, and her equitable title to it as her separate estate under the permission of her husband. Roper, *supra*. And he is also, upon the ground of his presumed authority to her, bound by her transactions in the trade, and responsible for the debts. Idem. This answers many of the authorities cited by respondent's counsel, and shows them inapplicable. They were cases at law in which property thus employed was held liable to seizure and sale to satisfy the husband's debts. They prove nothing here; these are proceedings in equity to charge the separate estate, on the faith of which the credits were given; and if it is admitted that the goods when purchased might have been taken for *Mr. Lee's* debts, that does not

affect the decision. It was one of the hazards to be considered by *Mrs. Lee* before embarking in the enterprise.

The great length to which the common law goes in denying the separate rights of the wife, is illustrated by the following cases:—

The property in wearing apparel, bought for herself, by a wife living with her husband, out of money settled to her separate use before marriage, and paid to her by the trustees of the settlement, vests by law in the husband, and it is liable to be taken in execution for his debts. *Carne* vs. *Brice*, 7 M. & W. 183.

A husband and wife separated by agreement (not under seal), and at that time he agreed to allow her a certain sum weekly for her support, which was paid; and she saved a portion of her allowance and invested it in stock, and disposed of the proceeds by way of *gift*. *Held*, That the husband was entitled to recover back the money so given in an action for money lent against the person who received it. *Messenger* vs. *Clarke*, 5 Exchequer 388.

A married woman deposited with the defendant the savings of certain rents of leasehold property, which had on her marriage been conveyed by her, with the consent of her intended husband, to trustees, upon trust to pay or permit her to receive the rents, &c., to her sole and separate use. *Held*, That the trust being discharged on the rents coming to the wife's hands, the trustee ceased to have any interest in or control over them; and that, upon the wife's death, her husband was entitled to bring an action in his own right to recover the money so deposited. *Bird* vs. *Peagrum*, 76 E. C. L. 638.

How far the introduction of legal instead of equitable estates, and the authority of the wife at law to hold and dispose of personal property which comes to her as separate estate, may be considered *in equity* as having relaxed this strict rule of the common law, so as to enable that Court to protect her against the demands of the husband's creditors in cases like these, where her separate legal estate is absorbed in the trade, or whether they have affected it at all, need not here be examined. No claim on the part of *Mr. Lee's* creditors (if there be any) has been interposed, and it is now too late for them to proceed. Nor need we inquire how far equity

would interfere in behalf of her creditors against his, since the former by superior diligence have acquired actual precedence. The moral force of a rule which would assist them to the products of a business, built up by their indulgence, would appear to be almost irresistible.

Neither are we to investigate *Mr. Lee's* personal liability. No demand for personal judgment is made against him. Nor does it seem there could be. As a trustee in equity, he is a proper party, but his personal liability, whatever it is, is legal, and must be enforced at law. The husband is liable upon the contracts of the wife only upon the principles of agency—that he has authorized her either expressly or by implication to bind him—the general rule being that she has no such power (1 Macqueen on Husband and Wife 131 (57 Law Lib. 93); *Freestone* vs. *Butcher*, 9 C. & P. 643 (38 E. C. L. 269); *Lane* vs. *Ironmonger*, 13 M. & W. 368); and whether she was authorized or not is a question of fact for the jury. Idem. In determining it, many circumstances are to be considered, as whether the contracts are extravagant (*Lane* vs. *Ironmonger*, *supra*), whether the husband having control of the goods does not cause them to be returned (*Waithorn* vs. *Wakefield*, 1 Cowp. 120), and whether the credit was not given solely to the wife, when it is said the husband will in no case be liable. *Freestone* vs. *Butcher*, *supra*; *Bentley* vs. *Griffin*, 5 Taunt. 356; 1 E. C. L. 131; *Metcalf* vs. *Shaw*, 3 Camp. 22. Mr. Roper thinks that whenever the wife is to be considered as acting as a *feme sole*, and entitled to the profits of her separate trade, as her sole and separate estate, the husband will not be liable, *in equity*, to her engagements contracted in it; that the creditor cannot complain, since he trusted to *her* credit only, and it would be unjust to subject him to her debts, when he is not entitled to any of the profits; and that a Court of equity will interfere to prevent the prosecution of the legal right, and at the same time subject the funds in the trade to the demands of her creditors. 2 Roper 174. But these positions are doubted by Mr. Jacob and Mr. Bright (2 Bright's Husband and Wife 301), and seem never to have been adjudicated.

The issuing of the injunctions and appointment of the receiver in these cases, was under the circumstances undoubtedly correct. They take the place of the process of attachment when necessary and proper at law. Such was the practice under the former system in equity, when there were no trustees of the separate estate, and the fund was in danger of being wasted or put beyond the reach of creditors. It was the course pursued in *Lilia* vs. *Airey*, 1 Vesey 277, and in *Meth. Epis. Church* vs. *Jaques*, 1 Johns. Ch. 450. And instances of an injunction where there were trustees are very numerous.

It follows from these views that orders dissolving the injunctions, and vacating the orders appointing a receiver in the first three entitled cases, and the judgments in the last two, must be reversed, and that all must be remanded for further proceedings according to law.

Orders and judgments reversed, and cases remanded.

We have, reluctantly, felt compelled to omit that portion of the opinion of Mr. Ch. J. DIXON, in which he gives a very elaborate and thorough review of the opinion of the New York Court of Appeals, in Yale *vs.* Dederer, 22 N. Y. R. 450. This we have done on account of the very great length to which the opinion would otherwise have extended. That portion of the opinion, forming more than one-half of the whole, not being essential to the authority of the case, although of marked interest and ability, we have therefore omitted.

After so thorough a review of the cases and so exhaustive a discussion of the principles of equity, involved in the question decided by this case, we should not feel justified in occupying much more space in regard to them. But some few cases have been decided, later than the published Reports, at the date of the opinion in that case, to which it may be of interest to refer. We have, through the courtesy of the reporter, been permitted to see the opinion of the Court, in the case of Willard *vs.* Eastham, 15 Gray, soon to be published, wherein the S. J. Court of Massachusetts held that the promissory note of a married woman (having separate estate), given by way of accommodation, as surety for another, not her husband, will not bind her separate estate, either the corpus of the property or the rents, issues, and profits, unless there is distinct evidence, from the contract itself, that such was her intention, or that the contract was upon the credit of such estate. The Court here thus state the English law: "The result of the English decisions would therefore seem to be, that the separate estate of a married woman is answerable, for all her debts and engagements, to the full extent to which it is subject to her own disposal." And this seems to us to be a very accurate statement, in all respects, so far as that point is concerned. For, upon examination of the English cases upon this question,

and they are quite numerous, it will be perceived, that a large number of them turn upon the point, how far the property was under the *disposal* of the feme covert.

The leading American case of The Methodist Episcopal Church *vs.* Jaques, 3 Johns. Ch. R. 77–121, where Chancellor KENT occupied so much space in reviewing and criticising the English cases, turns entirely upon the point, whether, by the deed of settlement, the married woman had the power to charge her separate estate, by all her engagements, in whatever form. And all the discussion in the English cases upon the question how far the contract is a good execution of the power of the wife over her separate property, according to the fair construction of the terms of the settlement, turns upon the same point: which we shall see is finally abandoned by the English Courts as untenable.

This question has been made the turning point in a very large proportion of the English cases. For the relatives and friends of married women, in attempting to make provision for their support, independently of the husband's resources, after the Equity Courts had determined that they had the same general power over their separate property, as femes sole, found it indispensable, in order to relieve wives from the power and importunity of husbands, to fetter the disposition of the wife's property with every clog and embarrassment, which would still leave it available for their own maintenance. Such a clause is often inserted to prevent the wife anticipating, or alienating, the income of her separate property. This was said to have been first done by the advice of Lord THURLOW, who was one of the trustees, in the case of Miss Walton. See Pybus *vs.* Smith, 3 Br. C. C. 347; Parkes *vs.* White, 11 Vesey 221; Jackson *vs.* Hobhouse, 2 Mer. R. 487; Lord COTTENHAM, Chancellor, in Rennie *vs.* Ritchie, 12 C. & F. 234. We are not aware that any well considered case has ever attempted to evade any restrictions upon alienation inserted in the deed of settlement. It is certain no such course of decision could be justified. It is clear, however, that this point is not the one upon which this case turns.

For it is obvious, that where Equity holds married women as having the same general power of disposing of their separate estate, as if they were sole, it is not easy to comprehend the ground upon which any distinction can be made, in principle, between debts evidenced by an express undertaking to charge the separate property, and those which are not; or between debts of suretyship and those where the consideration goes to the feme covert, or for the benefit of her separate estate, *so far as her intention to charge her separate estate is concerned.* If the promissor have no means of meeting an undertaking, except her separate estate, and could not bind herself personally, the conclusion seems irresistible, that if she contracts in good faith, she does intend to bind her separate property. It seems to us, therefore, that the American cases, among which we may name Yale *vs.* Dederer, 18 N. Y. Court of Appeals R. 265, S. C. 22 Id. 450, Willard *vs.* Eastham, *supra,* and many others, referred to in 1 Lead. Cas. in Eq. 427, Hare & Wallace's Am. Note, which have held that the promissory note of a married woman, for the accommodation of one not her husband, will not, *prima facie,* bind her separate estate, in equity; but that such contract will so bind her separate estate, if it appear, as some of the cases hold, from the contract itself, and as others hold, either from the contract or *aliunde,* that such was her intention, at the time of entering into the contract, do not rest upon any satisfactory prin-

ciple. We can comprehend the import, and the reasonableness, of such a rule when it is made universal, as a restriction upon the power of married women in regard to the disposition of their separate estates. We would not dissent from a legislative restriction, prohibiting married women from binding themselves (as they are now allowed to do, personally, in many of the states, as to contracts generally), or their separate property, *for any contract of suretyship.* Such a restriction, as to the husband, would certainly be judicious. It may be questionable whether the Courts could, with much show of reason, now adopt such a rule, but the legislature might do it. But the American Courts, in attempting to discriminate between the presumption of intention to charge the separate estate, where the contract is one of suretyship, and where it is one for the benefit of the feme, or of her separate estate, and holding that such presumption will not arise from the contract itself, in the former case, but that it will, in the latter, seem to us, to have manifested more sense of justice and indulgence towards the interest of the feme, than of tenderness in regard to the implications affecting her good faith, growing out of the reasons which they urge for the distinction. For it seems to be difficult to raise any distinction in regard to her intention to charge her separate estate, which will not finally implicate her in positive bad faith towards the person with whom she was contracting.

And the Court, in Willard *vs.* Eastham, feeling the force of this implication doubtless, has placed the case upon the ground that a contract of suretyship, being, *prima facie,* neither for the benefit of the feme, or her estate, cannot be made a charge upon her separate estate, unless by her express contract. And where the contract is in writing, this provision must form part of the writing, of course. This makes the decision more consistent with reason and with fact than those are, where a distinction is attempted to be made between the presumption of intention on her part in regard to charging her separate estate, when the contract is for her own benefit, or that of her estate, and when it is not.

It would be quite impossible to give any intelligible view of the American law upon this question, within any such limits as are allowed us here. It has seemed to us, that in those particulars in which the American Courts have departed from the rules of equity recognised in the English Courts, it has rather tended to make the law convenient and agreeable, than rational or consistent in itself.

1. The American Courts have required that in the deed or conveyance of the estate to the separate use of a married woman, it should expressly appear that she had power to charge the same by a given form of contract, in order to make such contract a charge upon such estate. Ewing *vs.* Smith, 3 Dessaus. 417; Trustees of Frazier *vs.* Center, 1 McCord's Ch. R. 270; Magwood *vs.* Johnson, 1 Hill C. R. 228; Robinson *vs.* Ex'ors of Dart, Dudley's Eq. 128; Reid *vs.* Lamar, 1 Strobh. Eq. R. 27.

In New York, Chancellor KENT condemned the English rule; Meth. Episc. Ch. *vs.* Jaques, *supra*; but his decision was reversed, 17 Johns. R. 548; and the New York Courts, through a long course of years, were understood to have recognised fully the English rule upon this point: That, where no restriction was placed upon the power of alienation, the Courts would not create any by implication. But that ground is certainly very essentially shaken in the opinion of Mr. Justice SELDEN, in Yale *vs.* Dede-

rer, 22 N. Y. Rep. 450. And the Courts in Pennsylvania seem to have adopted somewhat similar grounds. All this certainly shows very manifest dissatisfaction with the English rule, and an increasing disposition to protect the property of married women. And as married women have no power, by the common law, to make a contract personally binding, and it is only through the aid of Courts of Equity that such contracts can be made a charge upon their separate estate, it is to be expected that those Courts would affix such conditions to the relief granted, as they deemed requisite for the protection of the rights of those who are under their protection, in some sense. We only regret that there should be so much conflict between the English and American cases upon this point, when there seems so slight ground for departing from the English rule, as at present held.

2. This whole idea of regarding the estate of the wife in her separate property, as in the nature of a trust for her support, and that she can only charge it by virtue of a power given her for that purpose, which has led to so much discussion and confusion, both in England and this country, is a mere fiction, and as such has been formally and entirely abandoned in England within the last year. Johnson *vs.* Gallagher, 7 London Jur. N. S. 273 (March 1861). Lord Justice TURNER there said, "The doctrine of appointment, however, seems to me to be exploded by Owens *vs.* Dickinson, 1 Cr. & Ph. 48. A Court of Equity having created the separate estate, has enabled a married woman to contract debts in respect of it. Her person cannot be made liable either at law or in equity, but in equity her property may. This Court, therefore, as I conceive; gives execution against the property, just as a Court of law gives execution against the property of other debtors." * * "The evidence, I think, shows that the tradesmen who supplied the goods supposed and believed that she had separate estate, and dealt with her on that assumption. So far, therefore, as they were concerned, they dealt on the footing of a separate estate. How was it, then, on the part of the defendant? She was, as I have said, living separate from her husband, and had separate estate; and I think that when, under such circumstances, a married woman contracts debts, the Court is bound to impute to her the intention to deal with her separate property, unless the contrary is clearly proved. The Court cannot impute to her the dishonesty of not intending to pay for the goods which he purchased."

This view of the law is given by one of the ablest and most experienced equity judges now living, and upon a full review of all the English cases, and we must confess that it seems to us to have stripped the matter of much of its former complication and confusion, and to be far more satisfactory than any other view which we have yet seen. It would undoubtedly render the separate estate of a married woman liable upon her contracts of suretyship. And it is very obvious, that if she is held capable of assuming such obligations, in any form, so as to become a charge upon her separate estate, it is but an arbitrary requirement that the written contract, which by the Statute of Frauds is required to be in writing in order to bind her for the "debt of another," should go beyond the statute, and beyond the requirements of any positive law, and contain an express stipulation to the effect that she intends to bind her separate estate. This certainly looks like an invention to render the contract inoperative, and might lead simple-minded

suitors to suspect that, when that requirement is met, some other will be made. We suggest again the more satisfactory course of saying, at once, that Courts of Equity will not lend their aid to enforce a contract of suretyship against the separate estate of a married woman, in whatever form it may be made, or else of allowing such contracts of married women to stand upon the same general footing with their other contracts. I. F. R.

Supreme Court of Indiana.

JOHN REYNOLDS vs. THE BANK OF THE STATE OF INDIANA.

By the charter of the Bank of the State of Indiana, it was provided, that the bank should not at any time suspend or refuse payment in gold or silver, of any of its notes, bills, or obligations, &c., and that if it should neglect or refuse to do so, then the holder should be entitled to recover the amount with twelve per cent. interest. On the 1st of April 1862, the plaintiff demanded of a branch bank payment of its notes in coin, which was refused, but the amount tendered in United States legal tender Treasury Notes.

Held, (1st,) That the provision in the charter in question, did not amount to a restriction of the right of the bank to avail itself of the privilege of using anything else as money, as a tender, which the United States, by their laws, might legally declare to be such.

(2d), That Congress had *not* the Constitutional power to declare paper money a legal tender; but

(3d), That, considering that the Legislature and Executive Departments of the Federal Government had decided in favor of the existence of such a power, and what the consequences of an opposite decision at the present time by the court would be, they would hold the Treasury Notes to be a legal tender until the Federal Courts should determine otherwise.

Appeal from the St. Joseph's Circuit Court.

The opinion of the Court was delivered by

PERKINS, J.—On the first day of April, 1862, John Reynolds presented to the Branch at South Bend of the Bank of the State of Indiana, certain notes or bills issued by that Branch in the exercise of power conferred by the charter of the Bank, and, within the usual banking hours, demanded their redemption in coin. The Branch refused to redeem the notes in coin, but offered to redeem them in treasury notes, issued under late acts of Congress, and declared by act of Congress to be a legal tender. These

treasury notes, issued as they are upon no specie basis, but simply upon the indebtedness and credit of the government, and designed to circulate as money, fill the definition of bills of credit. The Circuit Court decided against the plaintiff, holding that the Bank might redeem in treasury notes. The charter of the Bank contains this section:—

"Sect. 8. The said bank shall not at any time suspend or refuse payment in gold or silver, of any of its notes, bills, or obligations, due or payable, nor of any moneys received upon deposit; and if said bank at any time refuse or neglect to pay any bill, note, or obligation issued by such bank, if demanded within the usual banking hours, at the proper branch where the same is payable, according to the contract, promise, or undertaking therein expressed, or shall neglect or refuse to pay on demand as aforesaid any moneys received on deposit to the person or persons entitled to receive the same, then, and in every such case, the holder of any such bill, note, or obligation, or the person or persons entitled to demand or receive such moneys as aforesaid, shall respectively be entitled to receive and recover interest on their said demands, until the same shall be fully paid and satisfied, at the rate of twelve per centum per annum, from the time of such demand as aforesaid, and any branch so failing to meet its engagements may be closed as in case of insolvency."

In the present condition of the country, if the Bank proceeds under this section of the charter to redeem her circulation in coin, she will probably destroy herself, ruin a large portion of her debtors, and distress the people; while, on the other hand, if she is legally bound thus to proceed, and does not, she will thereby also put her own existence in jeopardy.

In this dilemma the Bank asks for a speedy decision of the pending cause, and the plaintiff joins in the request.

The Constitution of the United States, Art. 1, sect. 10, ordains that no State shall "coin money, emit bills of credit, make anything but gold and silver coin a legal tender," &c. Indiana, in loyal submission to this limitation upon her power as a sovereign State, in framing her Constitution, provided, Art. 10, sect. 7, that "all

bills or notes issued as money shall be, at all times, redeemable in gold or silver": and as we have seen, the legislature in chartering the Bank of the State of Indiana, an institution created to issue a circulating medium of paper, required of her a compliance with this constitutional provision.—Sect. 8, above quoted. From such compliance the State cannot release the Bank. Can the United States do so? is the question. If the United States, under the Constitution, can make treasury notes a legal tender in payment of debts between citizen and citizen, she can make them thus between the States of the Union, corporations and citizens. And coming now to the particular case before us, as the section in the charter of the Bank of the State above quoted, was inserted to make it conform to the restriction upon the power of the State, imposed by the Constitution of the United States, viz., that a state shall not create money, in the constitutional sense of that word, and shall not by her own laws recognise anything as such but gold and silver, it is not reasonable that we should construe that section as a restriction upon the right of the Bank to avail herself of the privilege of using anything else as money, as a legal tender, which the United States, by her laws, might legally declare to be such. The true interpretation of the section must be, that the Bank shall not refuse to redeem her bills in what the Congress shall constitutionally make legal tender money. The Bank cannot be compelled to receive treasury notes from the citizen in one hand, and pay to the citizen gold and silver with the other. Under this construction of the charter, the Act of Congress in question does not impair its obligation, regarded as a contract. But it may be remarked, if Congress can impair the obligation of contracts, in this particular, between citizens, it can also between citizens and corporations, and the States and corporations. The decision of the cause, then, must turn upon the question, Can Congress make treasury notes a legal tender? Can it make anything but gold and silver coin a legal tender? The answer to this question must be drawn from the Constitution of the United States, for it is a judicially established proposition that Congress can exercise such powers only as are granted expressly or incidentally by that instrument. And

the same rule applies to every other department of the Government. It may be further observed that, if the proposition just stated is not true in every particular, then is our Government practically one of unlimited powers, and the Constitution a delusive bauble.

We proceed to investigate the questions above propounded.

I. The power to make treasury notes or anything else but coin, a legal tender, is not expressly given in the Constitution. The money-making power is granted to Congress in these words: "Congress shall have power to coin money, regulate the value thereof, and of foreign coin."

II. Is such power granted as an incident to any substantive power? That it is not, the following considerations strongly tend to prove, viz.:

1. The convention which adopted the Constitution not only did not grant, but they expressly rejected it, as a substantive power, and for the distinctly declared purpose of preventing its exercise by Congress, under any pretext or circumstances whatever—and this too after the power had once been expressly granted to the Federal Government; and the states subsequently ratified the Constitution with this understanding. Articles of Confederation, § 5; Elliott's Debates, vol. 1, pp. 258, 276, 413, and 531; Madison Papers, vol. 2, p. 1232; 3 Id. 1343 *et seq.;* 2 Story on the Const. 2 Ed., commencing at section 1358; Curtis's Hist. Const. vol. 2, pp. 328, 329, 364. The above proposition is established by the debates in the convention: See Madison Papers, *supra*, by the communications of members to their respective states: See Elliott's Deb., *supra;* and by the fact that members of the convention were members of the state ratification conventions.

2. Such paper is unequal to the functions of a national currency. It is claimed that the power to emit bills is an incident to that of regulating commerce—that a medium of exchange, a currency, is a necessity of commerce, and its creation an incident in the regulation of commerce. This argument is not as satisfactory as could be wished. It has apparent weaknesses.

1. As matter of fact, the bills are not emitted on account of commerce. Commerce does not apply for their issue.

2. They are not needed for domestic commerce; for foreign they are useless.

3. It is admitted that currency, as a medium of exchange, is a great necessity of commerce; and it is an acknowledged power of every government to ordain what shall constitute that currency. Governments have done so; but, throughout the civilized world, they have all concurred in declaring that gold and silver shall be that currency. Why they have so declared will be seen as we advance. Now, the precise question of what should be the currency of this nation, what should be its medium of commerce, what should be used to meet that necessity, was the one that was before the convention which constructed the frame of our government; and they ordained and established, by the paramount, the fundamental law of the nation, that that currency should be gold and silver, or paper issued upon and as the representative of gold and silver, and not bills of credit issued simply upon the indebtedness and faith of the government. Hence, it would seem that there could be no incidental power over this question, connected with the regulation of commerce.

And here the question occurs, Why was it ordained by our Constitution that coin should constitute the currency of this nation? As we have seen, currency is the medium of commerce, is created for commerce; and it is a necessity that it should consist of something that will circulate co-extensively with commerce; but commerce is not limited by geographic lines; its domain is the world; the republic of commerce is as expanded as the globe. Hence, to be equal to the exigencies of the subject, the currency must consist of that which will circulate with equal credit all over the globe: something that possesses an intrinsic value, a value not dependent upon the duration or condition of governments; that revolutions and changes in political organizations will not affect; for commerce looks not to, and does not depend upon, the forms of such organizations. The gold and silver in the rebel republic to-day is as good, the world over, as is that of the old legitimate republic, while its bills of credit are becoming as worthless as withered leaves. Such a currency, the experience of the world

proves, paper cannot be. Said Mr. Webster, in his speech on the currency, in 1837, "I am for a sound currency for the country, and by this I mean a convertible currency, so far as it consists of paper. Mere government paper, not payable otherwise than by being received for taxes, has no pretence to be called a currency. After all that can be said about it, such paper is mere paper money. It is nothing but bills of credit. It always has been and always will be, depreciated. Sir, we want specie, and we want paper of *universal credit*, and which is convertible into specie at the will of the holder. That system of currency, the experience of the world, and our own experience, have both fully approved."

Says Mr. Crawford, in his report, in 1820: "By the term 'currency,' the issue of paper by government, as a financial resource, is excluded." Funding Systems, p. 743.

But while bills of credit will not furnish a sound currency themselves, they tend to exclude such a currency, viz., coin, from circulation, and to drive it from the country. As such paper will not circulate in foreign countries, the importer, when he has received his balances here in that medium, is compelled to go to the banks and brokers and exchange it for coin, which he takes abroad with him; and, at present, as our main produce-exports are cut off, their place must be supplied by specie; and, as the banks are not required to retain specie for the redemption of their own paper, if the bills of credit are a legal tender, they can, and it is to be feared many of them will, dispose of their entire stock, as it will command a premium over paper, and, ere long, this country be left with nothing but a pure paper medium, without the basis of a dollar of specie. To illustrate:—The great bulk of our produce-exports, in years past, has consisted of cotton, tobacco, and rice. The report of the Secretary of the Treasury for 1861, shows that the value of cotton, rice, and tobacco exported in that year, exceeded two hundred and ten millions of dollars. We are now deprived of these articles of export, and the vacuum must be filled by coin, or commerce be in proportion diminished. So, the interest on our vast bond-indebtedness to foreigners must be paid in specie.

The cotton crop of last year, it would seem, is to be burned, and it is scarcely possible that a crop should be raised this year—(the loss of two cotton crops, in times of peace, would revolutionize the commercial and financial world)—and thus it would seem to be inevitable that a foreign demand will exist that must drain the entire specie from the country, as the counter home demand for it is removed by the bills of credit, if they are a legal tender; and when it is all exhausted what will be done then?

These considerations were vividly in the minds of the Convention that formed, and of the States that adopted our present Constitution. They had before them the then recent history of the issue of continental and state bills of credit, and the disastrous results thereof to the country, and they determined to prevent a repetition of the evils. See the subject most thoroughly discussed in 2 Story on the Constitution, 2d edition, commencing at section 1358.

On the other hand, the legislative and executive departments of the Federal Government have, within the past year, for the first time in the history of the Government, it is true, decided in favor of such a power, and have exercised it; and the disastrous consequences to the country that must follow a denial of the validity of that exercise of power, press hardly upon the judiciary to sustain the violation of the Constitution, if it be such, and thus create a precedent for further usurpations. But with the tribunal of last resort, such considerations should not have influence. The preservation of the Constitution, in its letter and spirit, should be an object outweighing, with that tribunal, all considerations of temporary inconvenience. That such would be the course of this Court, on a question arising under our state constitution, we think its past action will amply sustain us in asserting. In the case at bar, our decision is but that of a *Nisi Prius* Court, and we had better err in acquiescing in, than by declaring null the action of Congress.

Influenced, then, by deference to the action of the Federal Government, by the rule that all doubts must be resolved in favor of the law (a principle that tends constantly to augment the powers

of limited governments); by the exigencies of the times; by the consideration of the local injury, temporarily, to our State that would follow a different decision, and the fact that the question can only be decided finally by the Supreme Court of the United States, we hold that the Act of Congress, making treasury notes a legal tender, is within the Constitution and valid. Such will be the ruling of this Court, till the Federal Court shall determine the question otherwise. The Bank, by redeeming in treasury notes, does not expose her franchises to forfeiture. The judgment below is affirmed with costs.

It is therefore considered by the Court that the judgment of the Court below, in the above entitled cause, be in all things affirmed, at the costs of the appellant; all of which is ordered to be certified to said Court. And it is further considered by the Court, that the appellee recover of the appellant the sum of , for her costs and charges in this behalf expended.

Superior Court of the City of New York. May, 1862.

CHARLES B. HOFFMAN *et al. vs.* DANIEL MILLER *et al.*

M., C. & M., of Baltimore, indorsed in blank and deposited for collection with J. L. & Co., bankers and collecting agents in the same city, a bill payable in New York. The latter indorsed for collection to the plaintiffs, also bankers and collection agents doing business in New York. Each of these two houses was constantly remitting paper to the other for collection, and knew that each remitted paper for collection belonging to third persons. The remitted paper, when payable at sight, was collected, and then credited as cash. That payable in *futuro* was entered in the books of the house receiving it, as received for collection, and was not otherwise credited, unless, nor until it was actually paid. According to the course of business, each house drew for the cash balance in its favor, arising from actual collections, and not against paper remitted and not matured. There was no express agreement between them, that either should hold the paper it held running to maturity, as security for the paper remitted to the other for collection, or for cash balances. J. L. & Co., at the time of remitting the bill in question to the plaintiffs, owed them a small cash balance, and

immediately thereafter received from the plaintiffs other remittances, which they collected, but failed to pay over, and failed in business before the bill in question matured. The plaintiffs were immediately notified that the bill belonged to M., C. & M., but on demand thereof refused to surrender it.

Held, That the plaintiffs could not retain the bill as against *M., C. & M.*, as indemnity against the balance owing to them by *J. L. & Co.*, and that they were not *bonâ fide* holders for value in such sense as to have acquired a title superior to that of M., C. & M.

Held, also, That evidence by the plaintiffs, that in making the remittances, made after receiving the bill in question, they looked to, and relied on, the unmatured paper in their hands, received from J. L. & Co., was not entitled to any consideration, as neither any agreement nor the course of dealing between them and J. L. & Co., authorized them to so rely, and J. L. & Co. had no reason to suspect that any remittance made to them was influenced by any such consideration.

Appeal by the defendants from a judgment. This suit, when commenced, was brought against *Allan Hay & Co.*, as acceptors of a bill of exchange, dated "*Houston, Texas, September* 22, 1860," drawn by *John Dickinson* on *Allan Hay & Co.*, of New York, for $1100, payable thirty days after sight to the order of *Miller, Cloud & Miller;* and "accepted October 5, 1860, payable at the Bank of Commerce, in New York." When received by the plaintiffs it was indorsed thus:—"*Miller, Cloud & Miller;*" "*Pay Messrs. Hoffman & Co., or order, for collection,* JOSIAH LEE & Co., eleven hundred dollars." Allan Hay & Co. having no defence, except that they were ignorant to whom the bill should be paid (the plaintiffs and Miller, Cloud & Miller severally claiming to own it), were permitted, by an order in the action, to pay the money into Court, and Miller, Cloud & Miller were made defendants in their stead. The question now is, does the money belong to the plaintiffs, or to the substituted defendants Miller, Cloud & Miller?

The *plaintiffs' firm*, at and prior to receiving the bill, were bankers and collecting agents, doing business in the city of New York; and the firm of *Josiah Lee & Co.* were also bankers and collecting agents, doing business in the city of Baltimore.

Miller, Cloud & Miller, on the 20th of October, 1860, doing business in Baltimore, and then owning the bill in question, deposited it with Josiah Lee & Co. for collection, at the same time

indorsing it, in blank, as before stated. On the 23d of October, 1860, Josiah Lee & Co., after indorsing it in the form mentioned, enclosed that and another bill for $77.31, in a letter of that date, directed to the plaintiffs, and reading thus:—

"MESSRS. HOFFMAN & Co.: Dear Sirs:—We enclose for collection and credit, bills stated below. Respectfully, yours,

JOSIAH LEE & Co.

D. S. Cohen	$77.31
Allan Hay & Co.	1100.00"

The plaintiffs, by letter dated October 24, 1860, replied (*inter alia*) as follows:—

"MESSRS. JOSIAH LEE & Co., Baltimore.

Dear Sirs:—We have received your favor of 23d instant, with enclosures as stated.

$77.31 to your *credit*, and

1100.00 acceptance, Allan Hay & Co., due November 4–7, 1860, which we enter for *collection*."

Charles B. Hoffman, one of the plaintiffs, and the only witness on their part, testified thus:—"There were two accounts in the books of each; we kept an account of all paper sent to them (*Josiah Lee & Co.*), and it was called 'our account,' and drafts drawn against it were entered in that account. All paper received from them, and drafts against us, constituted the other account, which was called their 'account.'"

Q. Was the acceptance in suit ever passed to the credit of Josiah Lee & Co. upon your books?

A. No, sir; it was never passed upon the ledger; a memorandum of it was kept on the blotter and another small book. It was not our custom to pass paper to the credit of the remitting firm, in those accounts, until the paper matured and was paid, when we passed them on the ledger. Of the two acceptances mentioned in the letter of October 23d, one was paid on sight, and immediately passed to the credit of Josiah Lee & Co.; the other, being the acceptance in suit, was treated differently.

[The entry in plaintiffs' blotter was thus:—

"351. October 24, 1860.

"JOSIAH LEE & Co., *Baltimore*, (Their account.)

"Their remittance on D. P. Cohen . . . $77.31

———$77.31

"Allan Hay & Co. . . . . $1100"]

Q. Did you ever draw against any particular remittance, payable in future?

A. No, sir.

Q. Did you ever consider yourself entitled to draw as against remittances for collection prior to their maturity?

A. The question never came up.

Q. Did you ever do it?

A. No, sir; we never had occasion to do it.

Q. You did, at this time, a general collection business for account of customers?

A. Yes, sir.

Q. Any one that chose to deposit paper with you for collection, you forwarded it for collection?

A. Yes, sir.

Q. Was not that the general business of Josiah Lee & Co.?

A. Yes, sir; that was one branch; they were in the habit of receiving paper from other parties and transmitting it for collection.

Q. Was there any express and positive agreement between Josiah Lee & Co., in reference to this acceptance, except by the letter and order given in evidence?

A. No, sir, there was not."

Josiah Lee & Co. failed November 1, 1860, and on the 2d of that month delivered to defendants a written order on the plaintiffs, requiring them to deliver to the defendants the acceptance in question, the order stating, "they (the defendants) being the rightful owners of the same, and we being agents to collect." This order was presented to the plaintiffs, and the acceptance demanded of them before this suit was brought, and they refused to deliver it to the defendants.

The plaintiffs received the acceptance on the morning of the 24th of October. On the 23d there was a balance due to them from Josiah Lee & Co. of . .	$540.28
October 24, plaintiffs paid A. M. Allen on Josiah Lee & Co.'s letter of credit	200.00
October 24, plaintiffs remitted to Josiah Lee & Co. for collection	438.57
October 30, they also remitted to Josiah Lee & Co., for collection, a draft for	3000.00
They drew on Lee & Co., October 29, for . . .	600.00
and October 30, " . . .	3000.00

These drafts were protested; Lee & Co. collected the remittances of October 29th and 30th, and used the proceeds. They now owe the plaintiffs $3901.53, excluding from the calculation the acceptance in question. *Charles B. Hoffman* was allowed, against the objection and exception of the defendants, to testify, that for several months "we always took into account the paper that we had on hand, in remitting for collection, or drawing down our balances with them."

The judge, before whom the action was tried, found as facts (among others) that the paper, remitted by the one firm to the other, "always appeared to be the property of the party transmitting the same; each treated the paper so received from the other as the property of the party from whom it was received, * * the plaintiffs, until the 2d of November, 1860, had no notice that said acceptance belonged to any person other than Josiah Lee & Co., and relying upon the possession of said acceptance, and other securities, amounting to $467.50," they paid the $200 October 24th, and made the remittances of $438.67, and $3000,—"and from October 24th to October 29th, left the balance in plaintiffs' favor, arising from the collection of such drafts, and otherwise, in the hands of Josiah Lee & Co., undrawn for." He held as matters of law, that the plaintiffs, as bankers, have a lien on the bill in question, for the balance due them from Josiah Lee & Co.; and that they have acquired a valid title to the said bill of exchange as *bonâ fide* holders thereof for value; and gave judgment for the

plaintiffs for the amount of the bill, with interest, and ordered that the money paid into court by the acceptors, be applied on said judgment. The defendants excepted to these decisions; and appealed from the judgment to the General Term.

L. B. Woodruff & C. F. Sanford, for appellants.

Wm. C. Russell & G. Spring, Jr., for respondents.

By the Court. BOSWORTH, C. J.—On the facts, which the evidence will justify a jury or judge in finding, we think no discrimination favorable to the plaintiffs, can be made between this case and *Warner* vs. *Lee*, 2 Seld. 144, and *Scott* vs. *The Ocean Bank*, 5 Bosw. 192, and 23 N. Y. R. 289.

In *Warner* vs. *Lee*, John T. Smith & Co., with whom the plaintiffs had deposited for collection a note owned by them, made by Osborn & Whallon, sent it in a letter to the defendant, a banker, which letter stated that it was "enclosed for collection." In the present case, the indorsement to the plaintiffs stated that it was "for collection." The letter enclosing it (and another draft) stated that they were enclosed "for collection and credit." This, in the light of the evidence given, means that the draft for $77.31 was enclosed to be credited to Josiah Lee & Co., and the one for $1100, for collection. The small one was paid at sight, and was credited to Josiah Lee & Co. The large one—the one in question—was entered on the plaintiffs' blotter, as received for *collection*, and was never otherwise credited to Josiah Lee & Co.

In *Warner* vs. *Lee*, the plaintiffs had received no advances from John T. Smith & Co. The present defendants received none from Josiah Lee & Co.

In *Warner* vs. *Lee*, Smith & Co. were largely engaged in making collections of notes for merchants in New York, and the defendant was aware of that fact. In the present case, Lee & Co. "were in the habit of receiving paper from other parties, and transmitting it for collection." One of the plaintiffs so testifies, and of course he was aware of that fact.

In each case the accruing balances were collected in a similar manner.

In *Warner* vs. *Lee*, the referee did not find that any advances were made by defendant to John T. Smith & Co., on the credit of the note there in question. In the present case, the judge has found that the plaintiffs made advances to Josiah Lee & Co., on the credit of the acceptance in question. We shall attempt to show that this finding is not warranted by the evidence. Assuming, for the present, that this is susceptible of demonstration, then there is no difference between the facts of these two cases—except that in *Warner* vs. *Lee*, the note there in question was collected, and the proceeds received by the defendant, before any formal notice was given to him that the note was not the property of Smith & Co.; while in the present case, the plaintiffs did not collect the acceptance in question, and had formal notice before this suit was commenced, that it was the property of the defendants.

In *Warner* vs. *Lee*, the court said, that "When the defendant received this note he had notice, from its indorsement, from the course of business of Smith & Co., with which he was acquainted, and from the letter which enclosed the note to him, that it was placed in his hands for collection only, on account of the owners, the plaintiffs in this suit." Under these circumstances, if he had made advances upon account of it, he could not have held the note or its proceeds, against the plaintiffs. *Clark* vs. *Merchants' Bank*, 2 Comst. 380.

In the present case, the plaintiff had the same notice, except such as the *indorsement* furnished. In *Warner* vs. *Lee*, the plaintiffs indorsed the note in blank on delivering it to Smith & Co., and they filled up the blank indorsement with the defendant's name; whereby it was, in form, specially indorsed by the plaintiffs to the defendant. In the present case, the blank indorsement of the defendants was left as they wrote it, and Josiah Lee & Co. wrote under it a special indorsement by themselves to the plaintiffs, in terms stating it was for collection. The present plaintiffs had notice, therefore, that Lee & Co. had received it for collection; that they sent it for collection for the owners; and the natural

inference would be that the payees were the owners, it being indorsed only by them, and by Josiah Lee & Co. *Arnold* vs. *Clark*, 1 Sandf. S. C. R. 491, supports these views. If it be thought that the decision in *Warner* vs. *Lee* conflicts with that in *The Bank of the Metropolis* vs. *The New England Bank*, 1 How. U. S. 234, it would, nevertheless, be our duty to follow it, it being the decision of the court of last resort of this State, and controlling upon us. The latter case was cited in *Warner* vs. *Lee*, 2 Seld. 146, and of course was not overlooked.

In *Clark* vs. *The Merchants' Bank*, 2 Comst. 380, the court treated the material and controlling question as being "whether the bill in question was transmitted to Smith & Co.; for *collection merely*, or was to be credited to the plaintiffs *when received* by the former, whether collected or not." Id. And to complete the statement of the material elements entering into the question, GARDINER, J., added: "As the bill was indorsed in blank by the plaintiffs, the legal title passed to Smith & Co., *primâ facie*, and the plaintiffs must establish the fact that it was indorsed and forwarded for the purpose of collection."

In the present case, the plaintiffs have proved by evidence which is uncontradicted, that *Miller, Cloud & Miller* deposited the bill with Josiah Lee & Co. for *collection;* that the latter indorsed it specially to the present plaintiffs, and stated in the indorsement itself that they indorsed it to the plaintiffs for *collection*, and that the plaintiffs, on receiving it, entered it in their books as having been received for *collection*, and by letter to Josiah Lee & Co., informed them that they had entered it for *collection.*

In *Clark* vs. *The Merchants' Bank, supra*, GARDINER, J., discusses the evidence therein, as to the classes of funds remitted, and came to the conclusion that one class was remitted to be credited as *cash when received*, and to be drawn against, whether paid or not, at the time of so drawing; and that another class was remitted for collection, and was not to be credited or drawn against, until actually paid.

As to the class which was to be credited as cash *when received*, the Court held that the title passed to John T. Smith & Co., on

their reception of the same, and that their application of the *proceeds* to the payment of their own debt, could not be questioned in a suit against creditors (of John T. Smith & Co.) receiving them in good faith.

The error of the Court below was stated to consist in the assumption "that nothing went into account properly" until collected in the course of business (or in other words that nothing was to be credited as cash *when received*). Id. 385. GARDINER, J., summarily states the position of the parties, *inter se*, with reference to the different classes of remittances, thus: "For the first class they were to be credited with the right to draw upon their correspondents; as to the second and third the N. Y. firm were the *agents* of the plaintiffs, and had no other interest in and control over the assets, than such as was necessary to the discharge of their agency." Id. 385.

In *Scott* vs. *The Ocean Bank*, 5 Bosw. 192, and 23 N. Y. R. 289, the Court held, that,—

1. The property in notes or bills transmitted to a banker by his customer, to be credited the latter, vests in the banker only when he has become absolutely responsible for the amount to the depositor.

2. Such an obligation, previous to the collection of the bill, can only be established by a contract to be expressly proved, or inferred from an *unequivocal* course of dealing.

That case, in all of its material facts, bears a close resemblance to the one before us. And the Court say: "When, therefore, it appears that the bill in question was retained in the possession of the company (the party to whom it was sent for collection), after its acceptance, and that no credit had been given for it at the time it was passed to the defendants, and when nothing is disclosed in the whole course of dealings between the parties to show that any bill was ever credited or agreed to be credited in account before its collection, or that *Lyell* (the remitter) ever drew or was entitled to draw on the company, or that it was bound to accept drafts otherwise than upon and for funds actually received in cash, it must be understood that the company at the time of the transfer

stood in the relation of agents for its collection merely." In that case, the defendants received the bill from the company to secure a pre-existing indebtedness, and credited its proceeds to the company after it was paid; and they were held liable to the plaintiff for its amount.

If, therefore, it is clear upon the evidence that the present plaintiffs did not, and were not under any obligation to credit the bill in question to Josiah Lee & Co. *when received*, and that there was no agreement or understanding between them that remittances for collection or a delay to draw for cash balances was to be based upon or influenced by the consideration of holding paper sent for collection and not matured, then it will follow that the judgment in this case is in conflict with *Warner* vs. *Lee* and *Scott* vs. *The Ocean Bank*, *supra*.

With reference to this question, it may be observed, *first*, that the learned judge who tried this cause states in his opinion that "the only ground upon which the plaintiffs' claim can rest, is a mutual agreement between themselves and Josiah Lee & Co., that all remittances, made by either to the other, should be considered as made upon the faith of any prior remittances by the latter to the former, unless notice was given of the interest of others in the paper first remitted;" and, *second*, that the learned judge did not find as a *fact* that any such *agreement* was ever made.

There is no evidence that any express agreement to that effect was ever made. And we think it quite clear that no such agreement can be inferred from the course of dealing between those parties.

Charles B. Hoffman, one of the plaintiffs, testified as to the course of dealing between his firm and Josiah Lee & Co. thus: "We remitted to them, and they to us; they kept an account with us, and we with them; they drew upon us, and we upon them; sent paper for collection and so on; their remittances to us, if at sight, were collected at once and passed to their credit; the same course was pursued with the paper we sent them." That the question whether the plaintiffs "were entitled to draw as against remittances for collection before their maturity," "never came up;" that they never did it nor had occasion to do it, and that he

does not remember that his firm ever drew "otherwise than against balances" of collections actually made.

The only circumstance furnishing any evidence of any exception to this, as the uniform course of business, is in the testimony of Mr. Hoffman, to the effect that he remembered "one instance when we (his firm) paid a large over-draft by them" (Josiah Lee & Co.). By over-draft, as here spoken of, we understand a draft for a larger amount than the cash balance then standing to the credit of Josiah Lee & Co. Mr. Hoffman testifies that neither firm was "ever under obligation to pay any such draft," and that he thinks there were two or three instances of over-drafts by Josiah Lee & Co.

In opposition to this exceptional transaction, and in support of the understanding being in accordance with that indicated by the usual and common course of their business, is the fact that bills on time, when received, were entered in the books of the plaintiffs as having been received for *collection*, and were never otherwise credited, until actually collected; that the bill in question was sent, entered, and by plaintiffs' letter is admitted to have been received for collection, and never was otherwise credited to Josiah Lee & Co.

This evidence does not in any manner justify the finding of such an agreement, as the Court at special term held it essential for the plaintiffs to establish in order to recover; nor does it furnish any evidence of an obligation on the part of the plaintiffs to give credit to Josiah Lee & Co. for it until actually paid; or of any assent on their part that it, or other bills received under like circumstances, should be held by the plaintiffs as security for remittances subsequently made by them, or for the payment of any cash balance in their favor that might then happen to exist, or might subsequently accrue.

Under such circumstances, evidence by Mr. Hoffman "that we (his firm) always took into account the paper that we had on hand, in remitting for collection or drawing down our balances with them, *at least we did for several months*," should not be allowed any weight.

The answer imports, that this mental operation to which he testifies was of late occurrence and short duration; there is no pretence that it had been disclosed to Josiah Lee & Co., or was authorized or suspected by them—and so long as it is essential to a valid agreement that there should be at least two parties to it; evidence of what the plaintiffs "took into account or consideration," or "looked very closely and relied upon" in making remittances or delaying to draw cash balances, should be disregarded when it is clear that it was unauthorized, and that Josiah Lee & Co. had not the slightest reason to suspect anything of the kind.

We think, therefore, that no discrimination favorable to the plaintiffs can be made between this case and *Warner* vs. *Lee*, and *Scott* vs. *The Ocean Bank*, *supra*. That on the evidence it is clear that the plaintiffs received the bill for *collection*, and knowing that Josiah Lee & Co. received and forwarded to them for collection paper belonging to third persons, as well as paper owned by themselves; that Lee & Co. were not entitled to be credited with the bill until actually collected, and that there is no evidence justifying the claim of a mutual agreement or understanding that remittances for collection by either were made on the faith and security of paper in their hands, not matured and previously received for the like purpose, from the house to which such remittances were made.

We do not deem it material or useful to attempt to discriminate between *The Bank of the Metropolis* vs. *The New England Bank*, and *Warner* vs. *Lee*, or *Scott* vs. *The Ocean Bank*, *supra*. If it be supposed that no material difference exists, it is none the less our duty to conform our decision to the law, as declared by the Court of *dernier resort* of this state.

It is not to be denied, however much it is to be regretted, that there is an apparent conflict between the Courts of this and other states, as to the circumstances sufficient to constitute an indorser of paper a *bonâ fide* holder for value, so as to exclude the equities of third persons, or defences that could be made in a suit between the original parties. *Stalker* vs. *McDonald*, 6 Hill 93; *Warner* vs. *Lee*; *Scott* vs. *The Ocean Bank*, *supra*; *Swift* vs. *Ty-*

son, 16 Peters 1; *Le Breton* vs. *Pierce*, vol. 9, Am. L. R. 737, and note thereto in vol. 1, Id. N. S. p. 35.

It may be observed, however, that the *head note* in *Swift* vs. *Tyson* enunciates no rule in conflict with the decisions in this state. and if the fact was proved in that case (as asserted in the argument of Mr. *Fessenden*), viz.: "that on receiving the acceptance, he (the plaintiff) had given up the note of Norton & Keith, *which had been endorsed by one Child*," the decision is in harmony with those of this State.

The learned author of the *note* upon *Le Breton* vs. *Pierce*, 1 Am. L. R. N. S. p. 38, states that "it has always seemed to us that most of the controversy upon this subject has grown out of the different sense in which the terms are understood. If the term 'collateral' is understood to import that the bills thus held are not taken *on account* of the existing debt, *but only to be held until due, and if paid, the amount* to be applied, and in the mean time the creditor assumes no responsibility in regard to them, *except as the mere agent of the debtor for collection*, there could be no ground of claim that any property passed, or that existing equities in former parties were extinguished."

In *The Bank of the Metropolis* vs. *The Bank of New England*, *supra*, the Court says, "There does not, indeed, appear to be any express agreement that those balances should not be immediately drawn for, but it may be *implied*, from the manner in which the business was conducted; and *if* the accounts show that it was their *practice* and *understanding* to allow them to stand and *await the collection of the paper remitted*, the rights of the parties are the same as if there had been a positive and express agreement." This seems to hold that either an express agreement, or one justly inferrible from competent evidence, of the actual understanding of the parties, of the character stated, would make a holder of bills, received under that agreement, a holder for value to the extent of any balance due to him.

This may be conceded to be law, and yet, if we have taken a correct view of the evidence in the present case, and of its legal effect, the plaintiffs have failed to bring themselves within this